IN THE UNITED STATES COURT OF CLAIMS

No. 500-BIL

FORT BELKNAP INDIAN COMMUNITY, GROS VENTRE AND ASSINIBOINE TRIBES A TRIBAL GOVERNMENT,	)	Indian claims; alleged breach of trust relationship; jurisdiction; alleged breach of lease.
v.	)	
THE UNITED STATES	)	

AUG 6 1982

Francis X. Lamebull, attorney of record, for plaintiff.

Craig A. Decker, with whom was Assistant Attorney General Carol E. Dinkins, for defendant.

Before FRIEDMAN, Chief Judge, DAVIS and NICHOLS, Judges.

ORDER

In this case an Indian tribe alleges that the United States breached a lease with the tribe and also violated its fiduciary duties to the tribe. The defendant has moved to dismiss the petition. We deny the motion with respect

to the claim of breach of the lease, but grant it with respect to the other claims.

In Count One of the petition, the plaintiff asserts that the Bureau of Indian Affairs in 1970 leased 10,000 square feet of temporary office space from the tribe for $12,000 per year, but that the Bureau breached its contract by failing to pay pursuant to the lease. The eight other counts of the petition allege that existence and breach by the Government of a trust relationship with the Fort Belknap Indian Community.

The essence of these eight counts is that the government allowed the plaintiff to enter into certain unfortunate business agreements with third parties, regarding a construction project on the Fort Belknap Indian Reservation; that as a result of those agreements, the Fort Belknap Indian Community and its wholly owned subsidiary, Fort Belknap Builders,

Inc., suffered financial losses and other damages; and that the government's failure to protect the Fort Belknap Indian Community from entering into the allegedly unconscionable agreements was a breach of the government's fiduciary obligations to the tribe, for which the tribe may recover damages.

1. The government concedes that Count One states a cause of action for breach of contract that is within our jurisdiction under 28 U.S.C. § 1491 (Supp. IV 1980) over contract claims against the United States. The Government argues, however, that our six-year statute of limitations bars this claim. See 28 U.S.C. § 2501 (1976). The agreement upon which the plaintiff bases this claim was executed in 1970 and the present suit was not filed until 1981. We are unwilling to dismiss this count, however, because the plaintiff may be able

to show that the government's alleged breach was a continuing one.

2. The government seeks dismissal of the plaintiff's remaining eight counts on the ground that in these counts the plaintiff has failed to state a claim within the jurisdiction of this court. We agree.

For us to have jurisdiction over such claims there must be an alleged violation of federal statutes that "confer a substantive right to recover money damages from the United States . . . ." United States v. Testan, 424 U.S. 392, 398 (1976). Moreover, a statute creates a substantive right to money damages only if it "'can be fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id. at 400, quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967). The juris-

dictional requirements enunciated in Testan apply equally to Indian claims. United States v. Mitchell, 445 U.S. 535 (1980). There the Supreme Court stated that tribal as well as individual claimants "must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims." Id. at 538.

In the present case the plaintiff contends that the government's alleged fiduciary duty stems from a statute. The issue before us, therefore, is whether plaintiff has alleged the existence of a substantive right to money damages based on a statute that mandates compensation. As we recently stated, "although 'the substantive right to money' need not be explicitly stated in the substantive legislation itself, . . . Congress's waiver of sovereign immunity with respect to money compensation must be clear or

strong before the court can say that the statute mandates compensation.'" Inupiat Community v. United States, Ct. Cl. No. 596-77 (decided June 2, 1982) (quoting Mitchell v. United States, 229 Ct. Cl. ___, 664 F.2d 265, 268-69 (1981) (Mitchell II), cert. granted, 50 U.S.L.W. 3959 (June 8, 1982)).

The plaintiff relies upon 25 U.S.C. § 81 (1976), which provides in part:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of serivces for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be

> in writing, and a duplicate of it delivered to each party.
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> . . .

This provision does not mandate the payment of money if the United States approves Indian contracts that prove to be unwise or improvident. The statute was designed to protect Indians by subjecting their contracts with third persons to the prior examination and approval of the Secretary of the Interior and the Commissioner of Indian Affairs. See H.R. Rep. No. 2449, 85th Cong., 2d See.1, reprinted in 1958 U.S. CODE CONG. & AD. NEWS 3961. However, a Congressional intent to protect Indians falls far short of the "clear or strong" (Inupiat, supra) Congressional intent required to create a fiduciary duty by the United States to oversee and manage a tribe's contractual relations, for the breach of which the

United States must respond in damages.

In Mitchell, the Supreme Court concluded that despite language in the General Allotment Act (25 U.S.C. § 348) that the United States is to hold allotted land "in trust for the sole use and benefit of the Indian," the Act "cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." Id. at 546. The statute now before us falls far short of imposing a fiduciary obligation upon the United States that would make the government liable for losses Indians may suffer as the result of their contracts with third parties that the government approved. Cf. Hydaburg Coop. Ass'n v. United States, 229 Ct. Cl. ____, 667 F.2d 64, 69 (1981). ("It is a far different matter, however, given the broad view of sovereign immunity we must take under Mitchell, supra, and its predeces-

sors, to conclude that Congress intended the United States to be liable as a fiduciary for the promotion, maintenance, and management of assets and enterprises acquired by the Indians pursuant to the Act.").

The defendant's motion to dismiss with respect to Count One is denied, and that count is remanded to the trial division for further proceedings. The defendant's motion to dismiss with respect to Counts Two through Nine is granted, and those counts are dismissed.

BY THE COURT

Daniel M. Friedman
Chief Judge

DRAFT

THE UNITED STATES COURT OF CLAIMS

THE GROS VENTRE AND ASSINIBOINE TRIBES OF THE FORT BELKNAP INDIAN COMMUNITY, A TRIBAL GOVERNMENT,	)	No. _____
Petitioner,	)	PETITION
-vs-	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	

COMES NOW the Petitioner and for its claim for relief against Respondent alleges as follows:

COUNT ONE

I.

That the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community are organized as Indian Tribes pursuant to the Indian Reorganization Act of 1934 (25 U.S.C. § 476) and function as a tribal government pursuant to said Act and

have the inherent sovereign powers of self-government.

II.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1491, 1494, and 1505.

III.

That on or about April 1, 1970, Fort Belknap Indian Community, a tribal government, entered into a loan agreement with Montana Bank of Circle, N. A., a national bank chartered by the federal government, for the purpose of borrowing $350,000.

IV.

That as a further inducement for Montana Bank of Circle, hereinafter Bank, to make aforesaid loan to Fort Belknap Indian Community, hereinafter Community, and its agency, Bureau of Indian Affairs, agreed to rent 10,000 square feet of temporary office space for $12,000 per annum,

subject to the terms and conditions set forth in that certain letter of February 2, 1970, a copy of which is attached as Exhibit "A" to the Loan Agreement attached to this Petition as Exhibit "A". That said Agreement was approved by the Acting Director whose signature appears on the same Agreement; that the Bureau of Indian Affairs has failed and neglected to pay the $12,000 per year or any other sum to Petitioner's damage in the amount of $72,000.

COUNT II

I.

That the Respondent, United States of America, has assumed and undertaken a relationship of personal confidence and trust with the Fort Belknap Indian Community by virtue of the various treaties and federal statutes with regard to the land, property, and well-being of the tribal members of the Fort Belknap Indian Community. That said relationship is

founded upon the Treaty of October 9, 1895, ratified by Congress by the Act of June 10, 1896 (29 Stat. 321, 350). In addition, Petitioner, the Fort Belknap Indian Community, relies on 25 U.S.C. §§ 331, 348, 174, 185, 81, 160; the Indian Reorganization Act of 1934 (48 Stat. 984); and other pertinent portions of Title 25 of the United States Code and on the Act of March 3, 1921, c. 135 Stat. 1355. Petitioner further relies on the Regulations set forth in Title 25 of the Code of Federal Regulations.

II.

That the Respondent, United States of America and its agent, the Secretary of Interior, the Commissioner of Indian Affairs, the Area Director of the Billings Area Office and the Superintendent of the Fort Belknap Reservation breached their fiduciary responsibility and trust relationship as follows:

(a) By allowing Fort Belknap Indian Community to undertake in 1970 and 1971 through a wholly owned subsidiary the construction of houses at Fort Belknap Agency and elsewhere and by allowing the Fort Belknap Indian Community to make certain commitments including the borrowing of $350,000 from the Montana Bank of Circle, N.A. without first investigating the persons and background of the people who would be managing the construction project and who would be responsible for carrying out the commitments of Fort Belknap Indian Community and it wholly owned subsidiary, Fort Belknap Builders, Inc.

(b) By failing to adequately investigate the technical, managerial, and financial capabilities of economic Consultants and Fairchild Pola International who purported to enter into management contracts and management responsibilities for the aforesaid project

for construction of certain homes on the Fort Belknap Indian Reservation.

(c) By failing to adequately investigate the reasons Economic Consultants and Fort Belknap Builders, Inc. had been refused financing by the First National Bank of Great Falls and the misgivings that were carried in connection with such loans. Had the Respondent and its agents fully investigated the background of the principals and other parties who were encouraging Fort Belknap Indian Community to enter into the obligations and transactions surrounding the construction of homes on the Fort Belknap Indian Reservation, no such commitments and obligations would have been incurred by Fort Belknap Indian Community.

(d) Failed to provide adequate assistance to Petitioner, Fort Belknap Indian Community, during its negotiations with Economic Consultants, Fairchild Pola

International, and various banks and creditors and with the Fort Belknap Housing Authority and with the Housing and Urban Development Department. In one particular, the management agreement between Fort Belknap Builders, Inc., Fort Belknap Indian Community's wholly owned subsidiary, and Economic Consultants, Inc. was manifestly unfair. The Respondent and its agents were involved in the negotiations of that agreement and should have reached a similar conclusion and advised said Fort Belknap Builders, Inc. or Fort Belknap Indian Community against entering into such an agreement.

(e) Respondent and its agents failed to take action when it became aware that the management of Fort Belknap Builders, Inc. was remiss in carrying out its responsibilities.

(f) That the Respondent and its agents failed to take action when Fort

Belknap Indian Community's wholly owned subsidiary, Fort Belknap Builders, Inc., ran into serious financial difficulties and in particular when Respondent and its agents learned during the summer of 1970 that there were financial difficulties and in 1971 when further difficulties developed and when the promotional activities of Mr. Steve Long first were brought to Respondent's attention.

(g) That Respondent and its agents failed to take action by informing the Petitioner and other creditors that Fort Belknap Builders, Inc. was in financial difficulty and that the management of Fort Belknap Builders, Inc. was remiss in carrying out its responsibilities and that the promotional activities of Steve Long were jeopardizing the activities and operation of the construction projects heretofore referred to.

(h) That the Respondent and its

agents failed to provide advice and counsel to the Petitioner, Fort Belknap Indian Community, and to Fort Belknap Builders, Inc. when the Fort Belknap Indian Community and Fort Belknap Builders, Inc. reached the height of its dilemma in connection with the construction projects heretofore referred to; that Respondent and its agents failed to advise Fort Belknap Indian Community and Fort Belknap Builders, Inc. of the possibility of legal action against Economic Consultants, Inc. and against Steve Long and other parties who had mismanaged the affairs of Fort Belknap Builders, Inc. and who had mismanaged the construction project and who had obtained funds improperly when such action became apparent, all to the detriment of Fort Belknap Indian Community and to Fort Belknap Builders, Inc.

III.

That as a result of the breach of fiduciary relationship and trust relationship as aforesaid, Fort Belknap Indian Community has been damaged in the amount of $303,363.44, plus interest from May 29, 1972, at the rate of 10% per annum, plus reasonable attorneys' fees, as the result of the obligation of Fort Belknap Indian Community on a promissory note to Montana National Bank of Circle, N.A.

IV.

That further Petitioner has been damaged in the amount of $453,392.50, plus interest at 10% per annum from January 1, 1972, plus reasonable attorneys' fees, which sum is the amount owed by Fort Belknap Builders, Inc. to Montana Bank of Circle, N. A. as a result of obligations and promissory notes entered into for the purpose of financing the aforesaid housing construction projects.

COUNT THREE

I.

Petitioner realleges those matters contained in Count Two.

II.

That Respondent and its agents, the Secretary of Housing and Urban Development, the Regional Administrator for Housing Assistance, Region VIII, are guilty of fraud, misrepresentation, unfair trade practices, and taking unfair and undo advantage, all in breach of the Respondent's fiduciary and trust responsibility and relationship in the following particulars:

(a) The Respondent and its agents failed to disclose to Fort Belknap Indian Community, its subsidiary, Fort Belknap Builders, Inc., and Steve Long, the manager of Fort Belknap Builders, Inc., the engineer's estimate of cost for the Montana 10-5 Project and the Montana

10-1 Project; that failure to reveal such estimate was willfully and purposefully done and resulted in Fort Belknap Indian Community and Fort Belknap Builders, Inc. entering into a contract which was impossible of performance and which resulted in Fort Belknap Indian Community and Fort Belknap Builders, Inc. entering into obligations and responsibilities which it could not possibly keep; that said engineers estimate of cost for these projects was substantially higher than the amounts bid by Steve Long on behalf of Fort Belknap Builders, Inc., the subsidiary of said Petitioner, Fort Belknap Indian Community.

(b) Respondent and its agents failed to adequately advise and counsel Fort Belknap Indian Community and Fort Belknap Builders, Inc. as to the possibility of successfully completing the Montana 10-5 Project and the Montana 10-1

Project for the price bid for such projects.

(c) That Respondent and its agents failed to investigate the technical, managerial, and financial capabilities of Fort Belknap Builders, Inc. and its management team -- Economic Consultants -- prior to approving the assignment of the housing construction contract (Montana 10-5) from C & M Construction Company to Fort Belknap Builders, Inc. Such an investigation undoubtedly would have revealed serious deficiencies in the capabilities of Fort Belknap Builders, Inc. and its management.

(d) That Respondent and its agents failed to adequately monitor the management of Fort Belknap Builders, Inc. in connection with the Montana 10-5 Project and the Montana 10-1 Project. Evaluations should have included overall management as well as the technical

aspects of the housing construction.

(e) That Respondent and its agents failed to adequately consider the Fort Belknap Builders, Inc. technical and managerial difficulties when approving an additional construction contract, namely, the Montana 10-1 contract. The difficulties of Fort Belknap Builders, Inc. were readily apparent when the second contract was approved. By that time, the local Housing Authority had voiced doubts about the capabilities of the Fort Belknap Builders, Inc. and its management.

(f) The Respondent and its agents continued to approve construction contracts on the Cheyenne River Indian Reservation in South Dakota with individuals who were responsible for the mismanagement of Fort Belknap Builders, Inc., even though the roles of the same individuals in Fort Belknap were well known.

The continuation of these negotiations caused Petitioner to place greater confidence in Steve Long and other individuals responsible for the mismanagement of Fort Belknap Builders, Inc.

III.

That Petitioner further bases its claim for relief on a violation of the mandate and requirements of the Federal Housing Act of 1949, 42 U.S.C. § 1441 et seq., as amended, and 42 U.S.C. § 1453 and the National Housing Act, 12 U.S.C. § 1701 et seq.

IV.

That as a result of the failures and improper actions of Respondent, Fort Belknap Builders, Inc. and Fort Belknap Indian Community have been damaged in the amount of $303,363.44, plus interest at 10% per annum from May 29, 1972, as the result of the obligation of Fort Belknap Indian Community on a promissory note to

Montana National Bank of Circle, N. A.

V.

That further, Petitioner has been damaged in the amount of $453,392.50, plus interest at 10% per annum from January 1, 1972, plus reasonable attorneys' fees, which sum is the amount owed by Fort Belknap Builders, Inc. to Montana Bank of Circle, N. A. as a result of obligations and promissory notes entered into for the purpose of financing the aforesaid housing construction projects.

COUNT FOUR

I.

That on or about November 25, 1969, the Fort Belknap Housing Authority entered into an agreement for the construction of 50 houses on the Reservation of Fort Belknap Indian Community, said contract was assigned to Fort Belknap Builders, Inc., and to secure certain loans, to Montana Bank of Circle. A copy of said

contract is attached hereto as Exhibit "C".

II.

That said contract of sale, referred to as the Montana 10-5 Project, called for the construction and sale to Respondent of 50 houses for $846,000 or approximately $16,920 apiece. In truth and in fact, such houses cost in excess of $26,100 to build under the specifications and requirements established by the Respondent; that in fact, the next project, the Montana 10-6 Project, called for construction of the exact same houses at $26,100 each.

III.

That the terms in the contract setting forth the sums for which the houses were to be constructed and sold to Respondent constituted a mutual mistake and the contract should be reformed and in equity and fairness, the sum should be increased

from $846,000 to $1,305,000 to reflect the full and true value of the houses constructed and actually received by Respondent. That the additional sum and amount constituted unforeseen costs, and the mutual mistake of the parties should be corrected.

IV.

Fort Belknap Builders, Inc. is entitled to receive the sum of $459,000 in excess costs by way of reformation of the aforesaid contract. Said claim has been assigned to Montana Bank of Circle by virtue of an assignment set forth as Exhibit "B" attached hereto.

COUNT FIVE

I.

Petitioner realleges all those matters contained in Count Four herein.

II.

That the Respondent drafted all of the specifications for compliance with

the contract known as Montana 10-5, and the contractor has faithfully executed his performance in accordance with those specifications.

III.

The specifications for compliance with the construction contract of sale known as Montana 10-5 were defective and impossible of performance within the amount of money allocated therefor, and the contractor is entitled to compensation for costs incurred by it in attempting to comply with the defective specifications as well as for additional costs resulting from the changes necessary to correct the said defects; that the Fort Belknap Builders, Inc. has been damaged by having paid the contractor for said sums in the amount of $459,000.

IV.

That Fort Belknap Builders, Inc. has assigned this claim and all other claims

to Montana Bank of Circle by virtue of an assignment, a copy of which is attached hereto as Exhibit "B".

COUNT SIX

I.

Petitioner realleges all those matters contained in Counts Four and Five herein.

II.

That because of the aforesaid defective specifications and requirements, the contractor incurred substantial delay which caused substantial increase in costs to contractor, all of which have been paid or suffered by Fort Belknap Builders, Inc.

III.

That the Respondent failed to make payments as required under the contract and as provided for under the terms of the 20 houses for $370,000 or approximately $18,500 apiece. In truth and in fact, such houses cost in excess of the

contract, and as provided for under the terms of the contract, such partial payments and progress payments being required by the contract to continue its operation and failure caused delays to the contractor, and said delays caused substantial overruns and additional costs to the contractor, all of which have been paid with funds provided by the Montana Bank of Circle.

IV.

The Fort Belknap Builders, Inc. has been damaged in the amount of $453,392.59, plus interest at 10% per annum from January 1, 1972, plus reasonable attorneys' fees, which sum is the amount owed by Fort Belknap Builders, Inc. to Montana Bank of Circle, N. A. and could not be repaid because of the aforesaid failure to make payments as required under the contract.

V.

That Fort Belknap Builders, Inc. has

assigned this claim and all other claims to Montana Bank of Circle by virtue of an assignment, a copy of which is attached hereto as Exhibit "B".

COUNT SEVEN

I.

That on or about the 9th day of September, 1971, the Fort Belknap Housing Authority entered into an agreement for the construction of 20 houses on the reservation of Fort Belknap Indian Community, said contract was assigned to Fort Belknap Builders, Inc., a subsidiary of Fort Belknap Indian Community, and to secure certain loans to Montana Bank of Circle. A copy of said contract is attached hereto as Exhibit "D".

II.

That said contract of sale, referred to as the Montana 10-1 Project, called for the construction and sale to Respondent of 20 houses for $370,000 or approxi-

mately $18,500 apiece. In truth and in fact, such houses cost in excess of $26,000 to build under the specifications and requirements established by the Respondent; that in fact, the next project, the Montana 10-6 Project, called for construction of the exact same houses at $26,100 each.

III.

That the terms in the contract setting forth the sums for which the houses were to be constructed and sold to Respondent constituted a mutual mistake and the contract should be reformed, and in equity and fairness, the sum should be increased from $370,000 to $522,000 to reflect the full and true value of the houses constructed and actually received by Respondent. That the additional sum and amount constituted unforeseen costs, and the mutual mistake of the parties should be corrected.

IV.

The Fort Belknap Builders, Inc. is entitled to receive the sum of $152,000 in excess costs by way of reformation of the aforesaid contract.

V.

That Fort Belknap Builders, Inc. has assigned this claim and all other claims to Montana Bank of Circle by virtue of an assignment, a copy of which is attached hereto as Exhibit "B".

COUNT EIGHT

I.

Petitioner realleges all those matters contained in Count Seven herein.

II.

That the Respondent drafted all of the specifications for compliance with the contract known as Montana 10-1, and the contractor has faithfully executed his performance in accordance with those specifications.

III.

The specifications for compliance with the construction contract of sale known as Montana 10-1 were defective and impossible of performance within the amount of money allocated therefor, and the contractor is entitled to compensation for costs incurred by it in attempting to comply with the defective specifications as well as for additional costs resulting from the changes necessary to correct the said defects; that the Fort Belknap Builders, Inc. has been damaged as a result of these defective specifications in the amount of $152,000.

IV.

That Fort Belknap Builders, Inc. has assigned this claim and all other claims to Montana Bank of Circle by virtue of an assignment, a copy of which is attached hereto as Exhibit "B".

WHEREFORE, Petitioner prays for

judgment against Respondent as follows:

1. For the sum of $72,000 as set forth in Count One herein.

2. For the sum of $303,360.44, plus interest from May 29, 1972 at the rate of 10% per annum, plus reasonable attorneys' fees, as set forth in Count Two herein.

3. For the sum of $303,360.44 plus interest from May 29, 1972 at the rate of 10% per annum, plus reasonable attorneys' fees; and for $453,392.59, plus interest from January 1, 1972 at the rate of 10% per annum, plus reasonable attorneys' fees, as set forth in Count Three herein.

4. For the sum of $459,000 as set forth in Count Four herein.

5. For the sum of $459,000 as set forth in Count Five herein.

6. For the sum of $453,392.59, plus interest from January 1, 1972 at the rate

of 10% per annum, plus reasonable attorneys' fees, as set forth in Count Six herein.

7. For $152,000 as set forth in Count Seven herein.

8. For the sum of $152,000 as set forth in Count Eight herein.

DATED this _____ day of _____.

§81. Contracts with Indian tribes or Indians

"No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose

for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

§160. Custody of stocks or bonds held in trust for tribes

"All stocks, bonds, or other securities or evidences of indebtedness now [on June 10, 1876] held by the Secretary of the Interior in trust for the benefit of certain Indian tribes shall, within thirty days from the passage of this act [June 10, 1876], be transferred to the Treasurer of the United States, who shall become the custodian thereof; and it shall be the duty of said Treasurer to collect all interest falling due on said bonds, stocks, &c., and deposit the same in the Treasury of the United States, and to issue certificates of deposit therefor, in favor of the Secretary of the Interior, as trustees for various Indian tribes. And the Treasurer of the United States shall also become the custodian of all bonds and stocks which may be purchased for the benefit of any Indian tribe or tribes after the transfer of funds herein authorized, and shall make all purchases and sales of bonds and stocks authorized by treaty-stipulations or by acts of Congress when requested so to do by the Secretary of the Interior: Provided, That nothing in this act [this section] shall in any manner impair or affect the supervisory and appellate powers and duties in regard to Indian affairs which may be vested in the Secretary of the Interior as trustee for various Indian tribes, except as to the custody of said bonds and the collection of interest thereon as hereinbefore mentioned."

25 U.S.C. §174

§174. Superintendence by President over tribes west of Mississippi

"The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May 28, 1830, 'to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi'; and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever."

25 U.S.C. §185

§185. Protection of Indians desiring civilized life

"Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him."

25 U.S.C. §331

§331. Allotments on reservations---Irrigable and nonirrigable lands

"In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him for nonirrigable agricultural or grazing lands: Provided furtner, That where a

treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified in this act, with the consent of the Indians expressed in such manner as the President in his discretion may require."

25 U.S.C. §348

§348. Patents to be held in trust--Descent and partition

"Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted

in severalty under the provisions of this act: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the Treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent,

shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office [Bureau of Land Management], and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying [on February 8, 1887], any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purpose heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satis-

fied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act."

25 U.S.C. §462

§462. Trust periods extended

"The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress."

25 U.S.C. §470

§470. Appropriation for revolving loan fund

"There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established."

25 U.S.C. §476

§476. Organization of tribes--Constitution and by-laws

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise

such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget [Office of Management and Budget] and the Congress."

25 U.S.C. §477

§477. Incorporation of tribes

"The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress."

28 U.S.C. §1491

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

Nothing herein shall be construed to give the Court of Claims jurisdiction of any civil action with the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended [16 USCS §§ 831 et seq.], with respect to suits by or against the Authority."

§1494. Accounts of officers, agents or contractors

"The Court of Claims shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent or contractor, and to render judgment thereof [thereon] where--

(1) claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

(2) three years have elapsed from the date of such application without settlement; and

(3) no suit upon the same has been brought by the United States."

28 U.S.C. §1505

§1505. Indian claims

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

IN THE UNITED STATES COURT OF CLAIMS

No. 328-77

OCT 16 1978

THE MONTANA BANK OF CIRCLE, N.A.,	)	Breach of contract; breach of fiduciary duty; mutual mistake; defective specifications; delay; assignment; agency authority; Indians
Plaintiff,	)	
vs.	)	
THE UNITED STATES,	)	
Defendant.	)	

Thomas E. Towe, attorney of record, for plaintiff. Towe, Ball & Enright, of counsel.

Peter A. T. Sartin, with whom was Assistant Attorney General Barbara Allen Babcock, for defendant.

Before FRIEDMAN, Chief Judge, KUNZIG and BENNETT, Judges.

O R D E R

This case comes before the court on defendant's motion for summary judgment. Plaintiff is a national banking corporation whose claims against the United States rest primarily on alleged acts and omissions of the Bureau of Indian Affairs (BIA) and the Department of Housing and Urban Development (HUD). Plaintiff's claims are asserted to have accrued to it directly and also to the Fort Belknap Indian Community[1/] and the Community's wholly owned corporation, Fort Belknap Builders (Builders), of which two entities plaintiff claims to be the assignee.

In the early 1970's, the Fort Belknap Indian Community embarked upon a program of economic development with the strong support of the BIA.[2/] The Indians

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1/ The Fort Belknap Indian Community (or Fort Belknap Reservation) is comprised of the Gros Ventre and Assiniboine Indians.

2/ For purposes of this motion, we accept as true plaintiff's allegations of fact,

but not law, and treat the pleadings in the light most favorable to the plaintiff. See Aleut Community of St. Paul Island v. United States, 202 Ct. Cl. 182, 187, 480 F.2d 831, 833-34 (1973); United States v. Native Village of Unalakleet, 188 Ct. Cl. 1, 14, 411 F.2d 1255, 1261 (1969).

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decided to construct a factory building and to enter into the home building business. The Tribal Council established a for-profit corporation, Builders, owned wholly by the tribe and incorporated under the laws of Montana. Management for Builders was to be provided by a separate, non-Indian corporation, Economic Consultants, Inc.

Financing for the factory project was obtained from plaintiff after negotiation involving the BIA and the Indians. Plaintiff lent the tribe $350,000. Of this sum, $150,000 was to be used for the industrial complex and $200,000 by Builders as working capital. Additional funds appear to have been supplied by the

BIA. By letter of intent dated February 2, 1970, the BIA agreed to rent 10,000 square feet of subdivided office space for $12,000 per annum. One of the agreement's conditions was that the lease was necessary to qualify Builders for a loan from the bank (plaintiff). The letter of intent was incorporated in the loan agreement between plaintiff and the tribe, and the proceeds of the lease were contemporaneously assigned to plaintiff. The entire transaction was submitted to BIA for review, and its approval was recorded on these documents. The building was completed, but the BIA never took possession, for reasons which are disputed.

The several loans made by plaintiff appear now to be in default, and plaintiff seeks to hold the Government liable, relying on several different legal theories. In general summary these

theories include breach of the BIA's asserted obligation to lease space (Count I), breach of fiduciary duty (Counts II and III), mutual mistake (Counts IV and VII), defective specifications (Counts V and VIII), and Government-caused delays (Counts VI and IX).

As to Count I of the petition, plaintiff argues, alternatively, that it has a contract with defendant, that it is the third-party beneficiary of a contract between Builders and defendant, and that it is the assignee of Builders' rights under Builders' contract with defendant. Defendant denies that plaintiff has any enforceable rights under the letter of intent and further argues that the letter's terms were never breached by defendant because the office space was never made available to it.

We cannot say that plaintiff is without a claim on Count I, for there are

factual issues requiring development. The mutual intent of the parties cannot be determined without further investigation, nor can the disputed issue of whether the agreement was breached be decided at this juncture since conflicting affidavits have been submitted. Count I of the petition must be and is remanded to the trial judge.

The two counts based on breach of fiduciary obligation present unique and factually complicated arguments involving several issues of first impression. Under 28 U.S.C. § 1505 (1970), this court has jurisdiction of --

> * * * any claim against the United States * * * in favor of any tribe, band, or other identifiable group of American Indians * * * whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President * * * .

Plaintiff relies on both a treaty and on several statutes to establish defendant's fiduciary obligations to the Fort Belknap

Indians, and defendant, in its answer, has admitted the existence of a trust relationship with the tribe. Such obligations exist only where imposed by treaty, statute, Executive order, or agreement. See Sac & Fox Tribe v. United States, 179 Ct. Cl. 8, 27, 383 F.2d 991, 1001, cert. denied, 389 U.S. 900 (1967). This of course leaves open such questions as what the basis of the trust relationship is, what its obligations included, whether such duties are owed to Builders as well as to the tribe, whether defendant's obligations were breached, whether any claim arising out of such a breach can be brought by a non-Indian (to whom the duty does not run directly) upon an assignment of the claim, and whether any such claim was in fact assigned to plaintiff here. We recognize that some of the issues just stated appear purely legal, yet we believe all of them should be re-

manded for first consideration by the trial judge. We cannot rush to decide important legal issues without knowing that such issues are ripe, yet here a factual defect in plaintiff's theory may make it unnecessary to grapple with the novel legal questions, which have not in any event been adequately briefed for our consideration at this time and which can be more confidently decided (if necessary) once the factual background has been illuminated more clearly. Counts II and III are therefore remanded to the trial judge.

Counts IV-IX of the petition arise out of transactions concerning two low-income housing projects known as the Montana 10-5 and the Montana 10-1 projects. Both projects were to be built for, and sold to, the Fort Belknap Indian Housing Authority (IHA), which had been created by the Tribal Council in 1963. The 10-5

project involved a construction contract awarded by IHA to C&M Construction Company, whose responsibilities as builder were transferred to Builders in 1970. The 10-1 contract was similar except that Builders bore construction responsibilities to the IHA right from the start. Appended to both contracts were Annual Contributions Contracts, between HUD and the IHA, by which HUD undertook to provide financing for the projects. Assignments by Builders to plaintiff of rights under the 10-1 and 10-5 contracts were executed in exchange for other financing provided by plaintiff.

Builders met with problems and failed to complete either contract. Builders appears to have been incompetently managed. The IHA ultimately arranged to have construction completed by another firm, Smith Enterprises, which also was financed by plaintiff.

Counts IV through IX clearly lack merit. These counts all involve contract claims based on the two housing project contracts between the Indian Housing Authority and Builders, and plaintiff relies on assignments to stand in the shoes of Builders. But Builders' contract is with the Housing Authority, not with the United States, and there is no basis in such circumstances for a suit against the United States. Housing Corp. of America v. United States, 199 Ct. Cl. 705, 468 F.2d 922 (1972). Plaintiff attempts to escape this precedent, and the cases which have followed, see order of July 8, 1977, Beco, Inc. v. United States, 214 Ct. Cl. 820, by arguing that the Government bears special responsibilities when the housing authority is created by Indians. But, nothing in the statute which authorizes HUD to assist in the development of low-income housing

projects, 42 U.S.C. §§ 1401 et seq. (1970), suggests that a housing authority established by Indians stands on a different footing than those created by others. Moreover, the special responsibilities owed to this group of Indians are exhausted by the claims stated in Counts II and III, and they cannot serve to convert the housing authority into defendant's agent as plaintiff would have us hold. Plaintiff must, but here cannot, prove the actual authority of those whom it seeks to hold as the Government's agents. Housing Corp. of America v. United States, supra; Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947). Plaintiff also asserts defendant failed to make payments required under the Annual Contributions Contracts; any such claim would have to be brought by the Indian Housing Authority (with whom the contracts were made by defendant), but

there are no indications here of any dispute between the Housing Authority and defendant and no allegation is made that plaintiff is the assignee of the Housing Authority.

IT IS THEREFORE ORDERED, upon consideration of the pleadings and briefs, but without oral argument, that defendant's motion for summary judgment is granted in part and denied in part. Counts I, II, and III of the petition are remanded to the trial judge for further proceedings, and Counts IV through IX are dismissed.

BY THE COURT

Daniel M. Friedman
Chief Judge